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No. 91-10

IN THE

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON,
Petitioners,

vs.

SHIRLEY MCQUILLAN and LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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This Court can decide three issues of national importance by granting this Petition. First, it can resolve the long-standing conflict between the Ninth Circuit and the other Circuit Courts of Appeals concerning the elements of an attempt to monopolize claim. Second, this Court can make clear that it will not condone the Ninth

Circuit's disregard of this Court's "antitrust injury" requirement, most recently addressed in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. _____, 110 Sup. Ct. 1884 (1990). Finally, this Court can make antitrust law better reflect economic reality by determining, as a matter of law, that "antitrust injury" cannot result from a manufacturer's substitution of its distributors.

Respondents do not dispute that the Ninth Circuit's odd rule in attempt cases, first announced in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), has been soundly and continually criticized by judges and academic commentators alike. Nor do Respondents dispute that in the decision below, the Ninth Circuit ignored this Court's holding in *Atlantic Richfield* to the effect that antitrust injury cannot be presumed. Finally, Respondents do not oppose Petitioners' argument that a manufacturer's substitution of one distributor for another does not negatively affect competition. Instead, Respondents misstate the Ninth Circuit's opinion and try to minimize its effect.

Respondents argue that this Court should not grant the Petition on the basis of the *Lessig* rule because, irrespective of *Lessig's* flaws, the attempt to monopolize claim was not dispositive of the case. Quite to the contrary, the *Lessig* rule served as the only basis to affirm the judgment against Petitioners. Appendix, A28.

Respondents also try to minimize the impact of the Ninth Circuit's decision because it was unpublished. Such an argument might be persuasive were the *Lessig* rule an issue of first impression. But *Lessig* has caused great consternation for more than 25 years, and its impact will continue until this Court sets it aside.

Finally, Respondents' dispute Petitioners' description of this action as a "distributor substitution case" and claim falsely that it is instead a price fixing scheme, a plan to horizontally allocate markets, and a concerted refusal to sell. However, Respondents neither asserted nor proved horizontal market allocation or concerted refusal to sell against Petitioners, and the jury rejected Respondent's price fixing claim. This case is nothing more than a garden variety distributor substitution case that should not be caught in the net of the antitrust laws.

The Ninth Circuit affirmed the trial court judgment, solely on the basis of the *Lessig* rule. This Court should grant this Petition and make clear that one may not prevail in an attempt to monopolize claim without proving a dangerous probability that competition will be harmed.

This Court has recognized that non-price vertical restraints do not automatically harm competition. *See, e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). This Court should now make clear that simple distributor substitutions, one type of vertical restraint, do not harm competition.

Respectfully submitted,

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